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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

BROOKS LEE ANDERSON,
Petitioner,
vs.
WILBURN C. JOHNSON, Warden,
Respondent.
No. 700.

BRIEF OF RESPONDENT.

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BROOKS LEE ANDERSON, Petitioner,

vs.

WILBURN C. JOHNSON, Warden, Respondent.

No. 700.

BRIEF OF RESPONDENT.

STATEMENT OF QUESTION INVOLVED.

Does the finding of the district court that the petitioner failed in his effort to establish a pattern of unconstitutional exclusion of Negroes from jury duty find support from the evidence, or is it clearly erroneous within the meaning of **Fed. R. Civ. P.** 52 (a)?

ARGUMENT.

The petitioner, a Negro man with a lengthy criminal record (R. 54-58, 66-68; A. 27-29), was convicted in Maury County, Tennessee, in 1949 for the rape of a young Negro girl (Deposition of Larce M. White, p. 11; A. 77) and was sentenced to imprisonment for 49 years and one day (A. 77). The petitioner made no complaint during the criminal proceedings concerning the alleged exclusion of qualified Negroes from jury service. There was thus no judicial inquiry made as a part of his case concerning the jury selection practices or composition of the jury venire. The issue was initially raised in the state habeas corpus proceedings, filed almost 13 years thereafter, and later raised in the instant federal petition (A. 20).

The respondent does not contend that the petitioner made an intentional and purposeful waiver of his present insistence by failing to challenge his indictment or jury in the state trial court. The petitioner was there represented by appointed counsel, a respected white member of the local bar, who was well familiar with the then recent Tennessee Supreme Court decision of **Kennedy v. State**, 186 Tenn. 310 (1946); **cert. den.** 333 U. S. 846. To have challenged the composition of the jury venire would in all probability have been fruitless in the wake of this opinion (Deposition of Pride Tomlinson, Jr., pp. 14, 21, 22). The petitioner's delay in presenting his instant complaint has adversely affected the respondent, however, because of the complications the passage of so long a period of time has presented in the marshalling of precise proof concerning the true nature of Maury County jury selection in 1949. At the time of the federal evidentiary hearing on July 7, 1964, some 15 years after the fact, two of the three jury commissioners in July of 1948 (A. 46) were dead, and the third was 90 years old and too ill to attend court (R. 104).

The instant petition presented a multitude of complaints including discrimination against Negroes in the selection of grand and petit juries. On July 7, 1964, the district court conducted a full and complete evidentiary hearing on all of these complaints. At this hearing evidence was introduced both by the petitioner and by the respondent in the form of oral testimony, depositions and affidavits. At the conclusion of the hearing opportunity was given for the taking of additional proof (R. 115, 116). The case was retained under advisement until the lower court rendered its opinion on November 10, 1964, some 4 months later.

The district court held, upon a consideration of all of the evidence, and particularly "the highly credible testimony" of three of the respondent's witnesses, that the petitioner had failed to prove a prima facie case of purposeful and intentional discrimination against Negroes in the jury selection process (A. 58).

It is to be impressed upon the Court that this decision followed a trial at which the respondent offered evidence to refute the contentions, testimony and inferences presented by the petitioner. Normally appellate considerations as to whether a prima facie case has been proven arise pursuant to a direct appellate attack following a pre-trial proceeding wherein a defendant is unsuccessful in his attempt to prove purposeful and intentional discrimination in the jury selection process and the prosecution offers no evidence on this issue. In fact, from the numerous decisions of this Court on the subject matter in question, the writer has found only one other habeas corpus case and that is **Brown v. Allen**, 344 U. S. 397 (1952). The instant case was not determined at the conclusion of the petitioner's case in chief nor upon evidence introduced only by the petitioner. The district court considered all of the proof and determined that a prima facie case of

discrimination did not exist at the conclusion of the trial. It is important to keep in mind the stage of the proceedings at which this determination was made. The appellate court affirmed, stating that the petitioner had failed to prove a prima facie case of discrimination because of the proof introduced by the respondent, and particularly the affidavit of Judge Joe M. Ingram (A. 75).

Circuit Judge Thomas F. McAllister, in his dissenting opinion, indicated that he had some question as to the admissibility and probative value of Judge Ingram's certificate. He is of the opinion that this certificate was not subject to inquiry by petitioner's counsel and that Judge Ingram should be brought into court to testify in person (A. 100).

The certificate of Judge Ingram was introduced without any objection that the testimony was in the form of an affidavit or its content beyond the scope of 28 **U. S. C.**, § 2245 (R. pp. 107-110). Petitioner's counsel did object to the admission of the certificate as being beyond the scope of the pleadings. His objection was overruled and counsel was then asked by the district judge if this was his only objection to the certificate. His answer was "Yes" (R. p. 110). Should there be some question concerning the admissibility of this certificate under the statute cited, it would also be admissible under 28 **U. S. C.**, § 2246. Further, the petitioner was specifically given an additional period of 15 days within which to propound interrogatories to Judge Ingram or to file an answering affidavit if he so desired (R. pp. 115-116). The petitioner neither requested that Judge Ingram be produced for cross-examination nor were interrogatories propounded to him concerning the points covered in his certificate, nor was an answering affidavit filed.

The proof in the district court was that Negroes constituted a substantial segment of the population of Maury

County in 1949 and prior thereto (A. 23). The proof offered by the respondent showed that an unspecified percentage of these Negroes were qualified to serve as jurors (A. 40, 42, 45-47, 49, 52, 54). There was no proof in the district court to show what percentage of the Negro population was adult or male, thus meeting the most basic of the qualifications for jury service. The petitioner sought to cure this deficiency with a second census report (A. 24) which was obtained some 10 months after the district court decision and while the cause was awaiting argument on appeal.[1] The district court did not have the benefit of this census report. No witness remembered seeing, nor did they know of a Negro actually sitting as a member of a grand or petit jury prior to the date of the petitioner's trial (A. 42, 43, 52, 53, 55-57). How then could the lower courts declare that the petitioner had failed to prove a prima facie case of discrimination? The answer is simple. The foregoing constituted only a part of the proof before the court. The petitioner does not obtain relief merely because a portion of the total evidence might, without more, have created a prima facie case. If, prior to that stage of the proceedings at which the court is required to determine the existence of a prima facie case, the respondent offers satisfactory proof in explanation of what would otherwise require a presumption of unconstitutional discrimination, what does it matter whether the court's decision is expressed in terms of failure to prove a prima facie case or as a successful rebuttal of a proven prima facie case? As a practical matter the result is the same and if the result is supported by evidence the decision is to be affirmed regardless of the legalistic reasoning or manner of expression employed by the lower courts. **Brown v. Allen,** *supra.* This is not a case coming from a state court wherein this Court is required or permitted

1 By agreement of counsel, this census report was furnished by letter dated September 30, 1965, to the Clerk of the United States Court of Appeals for the Sixth Circuit to be made a part of the record.

to re-determine the facts concerning the controverted issue of constitutionality. The standard of review in this case, as in other civil cases tried by a district judge sitting without a jury, is that neither the legal tests applied to essential findings of fact nor the findings of fact themselves will be set aside unless they are "clearly erroneous". **Fed. R. Civ. P.** 52 (a); **United States v. E. I. DuPont De Nemours & Co.**, 351 U. S. 377 (1956).

What we are really concerned with here is whether the evidence supplied by District Attorney General Paul F. Bumpus (A. 38-43), Judge Joe M. Ingram (A. 44-47) and Pride Tomlinson, Jr. (A. 48-54), was sufficient to support the judgment of the district court. The judgment must be affirmed unless this Court is prepared to state that the view of the evidence taken by the district judge was "clearly erroneous". **Fed. R. Civ. P.** 52 (a).

Mr. Bumpus testified that Negroes were summoned for jury duty at practically every term of court but would request to be excused. His experience with the system as district attorney general extended from 1935 through 1950 (A. 40-42). Mr. Tomlinson, a practicing attorney, testified that following the racial disorder which occurred in Maury County in February of 1946 (**Kennedy v. State**, *supra*, at p. 313) Negroes were regularly called for jury duty. He confirmed the fact that those Negroes subpoenaed would often ask to be excused (A. 49, 50, 52). Mr. Tomlinson began practicing law in January of 1946 (Deposition of Pride Tomlinson, Jr., p. 3). Judge Ingram is the witness whose daily experience best qualified him to testify concerning the number of Negroes actually summoned for duty and serving as veniremen. Judge Ingram testified that he personally knew that Negroes have not been excluded from jury service since 1942, and further testified that he knows that at the time of the petitioner's trial, Negroes had been selected, named, and placed on the general venire list (A. 44-47). Judge Ingram identified 22

Negroes on the list as being members of the general venire from which the juries involved in the petitioner's case were chosen (A. 46-47).. Both the district court and appellate court gave substantial weight to Judge Ingram's testimony in reaching their respective decisions (A. 58-59, 75). Judge Ingram did not testify that there were **only** 22 Negroes in the group of some 1500 veniremen. He clearly stated that he had no recollection of how many, if any, Negroes were selected for service on the grand and petit juries for the May, 1949, term but that he himself had made a casual examination of the records of prospective jurors designated by the jury commission for the period in question and from only 3 of the 10 civil districts was able to pick out the names of 22 men that he personally knew to be Negroes (A. 46-47). Notice that there was no code or indication on this jury list enabling Judge Ingram to tell Negroes from whites. The witness, James E. Morton, confirmed the fact that 7 out of 14 of the names, about which the district court permitted counsel to cross-examine, were Negroes. Mr. Morton did not dispute the fact that the other 7 were Negro but only that he did not know them (A. 34-36). Judge Ingram's check of this record was some 16 years after the fact and did not purport to cover all of the 10 civil districts in Maury County or to claim that he knew each of the some 1500 persons on the list and the race to which each belonged. It is simply not accurate to maintain that Judge Ingram testified that **only** 22 of the some 1500 persons on the list were Negroes.

The petitioner relied on the testimony of Mr. Morton to prove the extent of the Negro population of the county possessing the qualifications required of jurors, but Mr. Morton did not know what the qualifications for jury service were, did not know what proportion of the total Negro population was adult or male, and did not know what proportion of the adult Negro male population were freehold-

ers or householders (A. 37). In addition, he was asked whether many or few of the members of his race in Maury County were "qualified voters" and his answer was an inconclusive "they are" (A. 31).

Keeping in mind the fact that the district court had no evidence before it from which any sort of estimate of the number of qualified Negroes could be made, the court determined that the petitioner had not made out a prima facie case of purposeful and intentional manipulation of the jury selection process which was intended to exclude Negroes from the jury. The proof shows that the jury lists were made from the tax rolls (A. 39, 48). There is no distinction on these tax rolls between white and Negro taxpayers (A. 39) as has been present in other cases before this Court (See also **Kennedy v. State**, *supra*, at p. 316). There is no distinction made on the jury list between whites and Negroes and there is no evidence at all of any type of system of different colored tickets or dots or other type of code to differentiate white from Negro as has been before the Court in previous cases. If there was any distinction made between white and Negro in the preparation of the jury list, it could only have come from the fact that the jury commissioners may individually have known which taxpayers were Negro and which were white. This information is now lost to us because of the delay in the presentation of the complaint. It must be pointed out, however, that if the jury commissioners intentionally set about to exclude Negroes from the jury list, they were not very proficient or systematic, if you prefer, because Negroes appeared regularly at the beginning of each term in response to subpoena for jury duty (A. 40, 42, 49, 52), 10 out of the 109 member venire facias and 4 out of 59 prospective petit jurors in **Kennedy** were Negro (See 186 Tenn. at pages 316 and 319), and they missed at least 22 Negroes in the preparation of the general venire list involved in

this case (A. 46-47). Judge Ingram stated under oath that he knows that Negroes were not excluded from jury service because, for one reason, he would not appoint men who would engage in such a practice (A. 44). This is a conclusion, of course, but one deserving of consideration. This is no mere appointed official. This is a lawyer and a judge who has sworn to God that he will uphold the Constitution of the United States. He presided while some 1100 pages of testimony on this point were taken in **Kennedy**. He heard the jury commissioners testify under oath (See **Kennedy v. State**, *supra*, at pages 313 and 317). He knows the significance of an oath and the difference between a conclusion and a fact. He stated under oath that he knows that Negroes were not excluded or refused jury service at the time of the petitioner's case (A. 44-45). His conclusion is solemn, founded on proven fact, has weight, and is of significance.

The petitioner states that the evidence shows to a mathematical certainty that intentional, purposeful and systematic exclusion of qualified Negroes from jury service existed. The petitioner seeks to convince the Court through this argument either that token selection of Negroes was practiced by the jury commissioners, or that the disparity between the number of Negroes allegedly eligible and the number of Negroes appearing at Court pursuant to jury summons would only admit of the conclusion that purposeful, intentional and systematic exclusion was being practiced. The petitioner argues that the second census report, dated September 17, 1965 (A. 24), shows that 20.79% of those Maury Countians eligible for jury service were Negro, and that since the respondent introduced no evidence to refute this conclusion, it must be taken as proved. The fallacy of this argument is that the census report from which the petitioner's percentage calculations arise (A. 24) was never introduced into evidence and has never been seen by the district judge.

Why should the respondent be required to refute that which had not been proven at the conclusion of the period designated for the presentation of evidence? The basic requirements for jury service in 1949 throughout Tennessee were that a juror must be male, 21 years of age, and a freeholder or householder. **Williams, Tenn. Code,** § 10006. Even had the census report of September 17, 1965 (A. 24), been before the trial court, there was, and still is, no evidence in this record as to the percentage either of white or Negro adult males who were freeholders or householders. This is no idle contention for the proof is that the jury commissioners compiled the venire list from the tax rolls (A. 39, 48; see also **Kennedy v. State,** *supra,* at p. 316). The practice of choosing jurors from tax records is constitutional so long as the tax records do not contain racial designations. **Brown v. Allen,** *supra.* The petitioner's percentage calculations are founded upon the assumption that each adult male citizen of the county, both white and Negro, was a freeholder or householder and thus included within the tax rolls from which the venire list was taken. These calculations are further founded on the assumption that the number of qualified whites and Negroes in each of the various civil districts of the county was the same, for the commissioners were required by private act to select prospective jurors from each of the civil districts of the county in proportion to the population of such districts (**Private Acts of Tennessee, Extra Session,** Chapter 45, Section 5, 1913). We know, however, from the witness, James E. Morton, that the ratio between white and Negro citizens varied between the numerous civil districts of the County (A. 37).

The petitioner apparently advised some mathematician, who never appeared as a witness in this cause, that as a proven fact, 9,470 white and 2,486 Negro residents of Maury County were qualified as jurors and that out of

1501 qualified citizens chosen as veniremen in 1948, only 22 were Negro. From these conclusions this mathematician produced certain percentage and probability figures in an effort to prove that the jury commissioners must have manipulated the names taken from the tax rolls in such a manner so as to exclude Negroes from jury service. The writer doesn't know enough about mathematics to challenge the accuracy of this man's calculations but does remember enough of grammar school arithmetic to know that to get the answer shown in the back of the book you first have to copy the problem down correctly. If you start with an incorrect problem or premise, the result will be equally incorrect even though the mathematical mechanics be accurate. The petitioner's premises are inaccurate because there is no proof that there were only 22 Negroes out of the 1501 veniremen and even if the second census report (A. 24) is considered, there is no proof as to the number or percentage of white or Negro adult males who were in addition freeholders or householders, and thus who would have been on the tax rolls and in line for selection by the jury commissioners. Presumably it would now be possible to go back to the 1948 tax rolls and determine the race of each person included therein by either bringing them into court or by bringing in some other citizen who remembers those taxpayers no longer available. In this manner the true percentage of those white and Negro citizens possessing the qualifications for jury service could be determined. It was not felt necessary to do this in the district court, however, because it was not proved there that any specific percentage of either the white or Negro population was adult, male, or a freeholder or householder (R. 42, A. 23). The only proof in the district court was that the total Negro male, female, adult and child population constituted about one-fifth of the total male, female, adult and child population in Maury County

(A. 23). Note that Mr. Morton incorrectly estimated this figure as being one-third of the total population (A. 23, 31). Some undetermined amount of the total Negro population possessed the qualifications for jury service. Some were subpoenaed for jury service at each term of court but would regularly ask to be excused, and at least 22 Negroes were included within the general venire which was selected in 1948. On the basis of this proof, the district court held that no purpose to discriminate had been shown and that the petitioner failed in his effort to establish a pattern of exclusion of Negroes from jury duty in Maury County during 1949. There is ample testimony in this record to support the finding of the district court.

The petitioner in his brief in the court of appeals pointed out with clarity the three steps followed in the selection of jury panels in Maury County at the time of his trial. These steps are as follows:

> (1) The selection from the tax books of the large list of names of prospective grand and petit jurors by Maury County's board of jury commissioners;
>
> (2) The selection from the jury commissioners' large list of a smaller list, which list made up the prospective grand and petit jurors for a particular term of court;
>
> (3) A narrowing of this smaller list by disqualification or by the judge's excusing from service persons summoned therefor.

These same steps were described in the opinion of the court of appeals at page 14 (A. 74) and again at page 27 (A. 86).

The petitioner contends here that discrimination or systematic exclusion was practiced in the compilation of the general venire or step number one. This was not his contention below. The petitioner would describe his own

actions as failing to "press this point in the court of appeals" (Petitioner's brief, footnote 3). The respondent challenges the petitioner's choice of words and would instead describe the petitioner's present position as an absolute reversal of position since the petitioner, in presenting his position to the court of appeals, clearly admitted that discrimination was not practiced in either of the first two steps. The petitioner said:

> "Appellant contends that the District Court's decision was addressed only to the first two of these three steps in arriving at jury panels from which jurors who actually served on grand and petit juries are selected. **And Appellant on the basis of the evidence introduced in the District Court cannot quarrel with the decision on those points.**" (Brief of Petitioner-Appellant, United States Court of Appeals for the Sixth Circuit, p. 10, emphasis added).

The court of appeals in attempting to isolate the petitioner's complaint stated on page 15 (A. 74):

> "On the basis of the evidence introduced in the district court, appellant now concedes that there was no systematic exclusion in the first two steps. Therefore, if systematic exclusion of Negroes did in fact take place it would be the result of step three, *i. e.*, either by disqualification or by the judge excusing from service persons summoned therefor." (See also A. 86-87.)

The petitioner is, of course, bound by judicial admissions of counsel. **Oscanyan v. Arms Company**, 103 U. S. 261 (1880); **Bosworth v. Terminal R. Ass'n.**, 174 U. S. 182 (1899). The petitioner having previously admitted that he had not proved discrimination in the selection of the master jury list or general venire from the tax books and in the selection of the lesser list for prospective jurors for a particular term of court or venire facias should not now

be heard to reverse his earlier stand and contend that he had carried his burden of proving discrimination in the selection of the general venire. The petitioner should not be permitted to attempt to hold the court of appeals in error on a proposition which he conceded and gave this court no opportunity or reason to consider.

The petitioner's thrust in the court of appeals was that discrimination did not result in the jury selection process until step number three was reached. He contended that systematic exclusion of qualified Negroes from jury service resulted from a practice of "systematic excusing" (A. 88) of Negroes from jury duty practiced by Judge Ingram. The petitioner apparently calls upon the Court to rule that the discretion allowed to the trial judge by **Williams Tenn. Code** § 10011 is unconstitutional because of the liberality shown pursuant thereto to requests made by Negroes to be excused from jury duty. The petitioner apparently argues that it was offensive to whites in Maury County, Tennessee to have Negroes serve on juries and that because of this community attitude they requested to be excused knowing full well that the judge normally excused both white and Negro if they preferred not to serve (A. 43). There is no proof of any such hostile community attitude and even if it existed it would hardly constitute state action. If this is the gravamen of the petitioner's argument, it would not appear to be of moment whether 0% or 20.79% of the general venire was Negro for a racist community attitude, coupled with a lenient judge, would insure perpetuation of an Anglo Saxon jury. The fact that the petitioner was made a "trustee" at the Maury County jail even after he turned loose all of the other prisoners belies any such feeling either against the petitioner or his race (Deposition of Flo Flemming, pp. 4-5; Deposition of Larce M. White, pp. 7-8).

The petitioner contended below that regardless of intent or justification "official action" or "systematic excusing"

by the trial judge in relieving Negroes from jury service at the request of these jurors or their employers or for any reason amounted to "systematic exclusion" and such a purposeful discrimination against Negroes as to render void the conviction of any member of this race. Note, however, that the petitioner has absolutely failed to show that any of the at least 22 Negro veniremen on the general venire and presumably available for service on his case requested to be excused or were excused from jury service. He went no further than to say that the twelve jurors at his trial were white. A mere showing that a class was not represented in a particular jury is not enough. There must be a clear showing that its absence was caused by discrimination. The burden is upon petitioner to prove such discrimination to be purposeful and intentional. **Fay v. New York**, 332 U. S. 261 (1947). Further, there is not even an inference from the proof that Judge Ingram excused any veniremen without first receiving a request to do so by or on behalf of the prospective juror. Nor is there any suggestion that the requested excusals were involuntary or the result of pressure, coercion or influence exerted from any source.

District Attorney General Paul Bumpus testified that at or about the time of the petitioner's trial, Negro jurors regularly asked to be excused from jury service for various reasons, sometimes because they were needed at their jobs and sometimes because they just didn't want the responsibility of serving (A. 40, 42-43). The petitioner's defense counsel testified accordingly (A. 50, 52). If the petitioner's contention becomes the law, no Negro defendant could have been lawfully convicted in Maury County because of the failure of fellow members of his race to accept this responsibility of citizenship. The petitioner apparently advocates that the trial judge was obligated to force some Negroes to remain on jury duty regardless of their jobs, commitments, or wishes solely in

order to maintain an appearance of constitutionality. This is jury packing and equally as unconstitutional as the converse. Jurors should be selected as individuals, on the basis of individual qualifications, and not as members of a race. **Cassell v. Texas**, 339 U. S. 282 (1950).

It is not required that there be a proportionate representation in the jury venire of all races, classes, and religions present in the community. Neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group. **Akin v. Texas**, 325 U. S. 398 (1945); **Swain v. Alabama**, 380 U. S. 202 (1965). In **Akin v. Texas**, *supra*, the population of the community was approximately 15½% Negro, a substantial number of which were qualified to serve as jurors. Yet, it was shown that only one Negro had served on each of two successive jury venires. This Court held that this fact alone did not prove racial discrimination. In **Swain v. Alabama**, *supra*, decided in 1965, there had been an average of 6 to 7 Negroes on petit jury venires for 15 years, but no Negro had actually served on a criminal petit jury. This Court held that it did not consider an average of 6 to 8 Negroes on these panels as constituting forbidden token inclusion or invidious discrimination. See **Hoyt v. Florida**, 368 U. S. 159 (1961).

Due to the unique character of the petitioner's theory that you must look solely to the result of the trial judge's action rather than to its reasonableness, the respondent has been unable to locate a case exactly on point but would direct the court's attention to a somewhat analogous situation in **Swain v. Alabama**, *supra*. In this case, the prosecution was allowed to pre-emptorily challenge all Negroes in the general venire. The Negro defendant contended that his constitutional rights had been violated by the prosecution's obvious systematic and arbitrary exclusion of all Negroes in the general venire. Alabama argued

that its system of jury selection provides justification for the striking of any group of qualified jurors, whether they be Negroes, Catholics, accountants, or those with blue eyes. This Court in affirming the defendant's sentence of death stated ". . . we think there is merit in this position" (P. 212).

If it is constitutional for the prosecution to arbitrarily strike all Negroes from a jury panel because of their race, then certainly it is constitutional for a judge to honor the voluntary request of any juror, regardless of race, color, or creed to be excused from jury service. It should be noted that no showing has been made that Judge Ingram employed any different standard in dealing with requests for excusal from prospective white jurors than that used with prospective Negro jurors. In fact, District Attorney General Bumpus testified that all prospective jurors received equal and sympathetic treatment on their requests for excusal from jury service regardless of race (A. 43).

The respondent feels that **Kennedy** will be persuasive that no unconstitutional exclusion of qualified Negro jurors by jury commissioners, judge, prosecution, or any source existed in Maury County immediately prior to, in, or subsequent to 1949. Some 1100 pages of testimony were there taken on this issue. The jury commissioners of Maury County were among those testifying. This proof showed that 10 out of 109 citizens summoned for the venire facias were Negro and that 4 out of 59 citizens drawn for prospective petit jury service were Negro. Although the use of population statistics in jury discrimination cases was well established at the time of **Kennedy**, it is perhaps illuminating to note that the defendant's counsel, including a present member of the Court, saw fit not to base their argument on the theory of a disproportionate representation of the Negro race on the jury venires (**Kennedy v. State**, *supra*, at p. 317).

The respondent does not now and has never contended that **Kennedy** should be conclusive of the instant issue. Of course, in habeas corpus proceedings a federal court under certain circumstances may adopt findings of fact made in a state court proceeding in the same case. **Townsend v. Sain**, 372 U. S. 293 (1963). Likewise, the findings of a state court in the same case on the issue of discrimination, although not binding on the Court, are entitled to great respect. **Pierre v. Louisiana**, 306 U. S. 354 (1938). By the same reasoning process, this Court should be entitled to consider the findings of **Kennedy**, as at least persuasive of the instant issue, particularly in light of the presumption that the jury commissioners and the trial judge performed their duties in a legal and constitutional manner until proven to the contrary. **Akins v. Texas**, *supra*. The petitioner, however, says that **Kennedy** is demonstrably erroneous on its own record. The petitioner and his mathematician apparently argue that the probability of only selecting 7 Negroes in a venire facias of 109 from a group of 11,771 qualified citizens (A. 24), 24.70% of which were Negroes is so slight as to leave no reasonable conclusion but that the general venire had been manipulated in order to produce only token compliance. Once again the fallacy of this argument is that there is absolutely no showing as to the number of adult males, white or Negro, possessing the qualifications for jury service.

It is submitted that the explanation offered both by District Attorney General Bumpus and Mr. Tomlinson as to why relatively few, if any, Negroes actually sat in the jury box as members of grand or petit juries in Maury County prior to and in 1949 is reasonable and amply supported in the record. The petitioner characterizes this explanation as unsatisfactory but the testimony of these lawyers is undisputed and was regarded by the district judge as "highly credible" (A. 58). The explanation did satisfy the district judge.

CONCLUSION.

The petitioner has previously conceded that he failed to prove any unconstitutionality in the formation of the general venire or step number one and the formation of the venire facias or step number two. He now seeks to recant and on the basis of an inaccurate statistical theory, advance a proposition which he has previously acknowledged to be not borne out by the proof. The petitioner has failed to show any improper purpose or bias on the part of Judge Ingram in his disposition of requests from Negro or white veniremen to be excused from jury duty. He has failed to show that any of the numerous Negro veniremen available for his trial requested to be excused or were excused by the trial judge. He has failed to show that these Negro veniremen were not available for selection as members of the grand jury that indicted him or petit jury that convicted him. The proof establishes that numerous members of the general venire were Negroes. The proof instead of showing discrimination against Negroes, on the contrary establishes that great latitude was extended to them by the trial judge. It is submitted that the district court correctly held that the petitioner failed in his effort to establish a pattern of exclusion of Negroes from jury duty in Maury County during 1949. It has not been shown that this decision is "clearly erroneous" and it should again be affirmed.

Respectfully submitted,

.....

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Affidavit of Service.

State of Tennessee }
County of Davidson }

Ed R. Davies, being duly sworn, says that he served the foregoing brief upon J. Brad Reed, attorney for the petitioner, on Friday, December 15, 1967, by leaving a copy at his office at 1000 American Trust Building, Nashville, Tennessee 37201, with the person in charge thereof.

.....
Ed R. Davies.

Sworn to and subscribed before me, this 15th day of December, 1967.

Imogene P. Etter,
Notary Public.

My commission expires: Oct. 4, 1969.
(Seal)